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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5444

EHRLICH ANTHONY COKER,

Petitioner,

—v.—

STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE NATIONAL ORGANIZATION FOR WOMEN LEGAL DEFENSE AND EDUCATION FUND, THE WOMEN'S LAW PROJECT, THE CENTER FOR WOMEN POLICY STUDIES, THE WOMEN'S LEGAL DEFENSE FUND, and EQUAL RIGHTS ADVOCATES, INC.

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BRIEF AMICI CURIAE

Interest of Amici *

The American Civil Liberties Union is a nationwide, nonpartisan organization

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* This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women is a pervasive problem at all levels of society, and is often reinforced by governmental action, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of sex-based discrimination.

The Center for Constitutional Rights is a non-profit tax-exempt legal and educational corporation dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Born of the efforts of lawyers in the Southern Civil Rights movement, the Center has, since 1969, devoted substantial energy to the struggle of women to effectuate their constitutional right to the equal protection of the laws, and has focused attention on unequal treatment in the area of rape. The Center has become involved in rape victim representation and in efforts to eliminate the special evidentiary requirements and excessive penalties which impede the operation of rape laws.

Organized in 1966, the National Organization for Women (NOW) is a national membership organization of over 40,000 women and men in 700 chapters working to bring women into full and equal political, social and economic

rights for women. The NOW Legal Defense and Education Fund is the litigating and educational arm of the National Organization for Women.

The Women's Law Project is a non-profit feminist law office located in Philadelphia, Pennsylvania and dedicated to working for the legal equality of women through litigation, public education, research and the representation of local women's groups. The Project has represented,among other groups, Women Organized Against Rape, a Philadelphia group working for change in the legal process regarding rape.

The Center for Women Policy Studies (CWPS) is a non-profit, tax exempt corporation founded in 1972 and located in Washington, D.C. Its purpose is to improve the economic and legal status of women. In 1976, pursuant to a grant from the Law Enforcement Assistance Administration (LEAA), the Center published guidelines to improve the response of criminal justice agencies, hospitals, and community groups to victims of rape. Under another LEAA grant, CWPS renders technical assistance to selected victim assistance projects, publishes a newsletter and runs a clearinghouse for persons concerned with the welfare of victims of rape.

The Women's Legal Defense Fund is a non-profit, tax-exempt corporation located in Washington, D.C. organized in 1971 to secure equal rights for women by providing volunteer legal representation as well as sponsoring informational and educational activities on legal issues of special interest to women. The Fund, through the volunteer activities of its 200 members, has served on the Washington, D.C. Task Force on Rape which recommended reducing the severe statutory penalties for rape and has represented a number of rape victims, working with the D.C. Rape Crisis Center.

Equal Rights Advocates, Inc. (E.R.A., Inc.) is a non-profit, tax-exempt legal and educational corporation located in San Francisco, the primary aim of which is to promote equal rights of men and women under law. A substantial measure of the time, energy and resources of E.R.A., Inc. is spent in litigation and legal education designed to further constitutional and statutory principles of non-discrimination on account of sex.

As legal organizations devoted to equal rights for women, amici submit this brief to demonstrate that the death penalty for rape is a reflection of archaic views of women, and that the excessive severity of the penalty leads to a refusal by juries to convict guilty defendants as well as to evidentiary rules which hamper prosecution. It is

further contended that jury unwillingness to impose such a severe penalty indicates that the death penalty does not meet the standards of the Eighth Amendment.

Opinion Below

The opinion of the Supreme Court of Georgia is reported at 234 Ga. 555, 216 S.E.2d 782(1975) and is set out in the Petition for Writ of Certiorari at Appendix A.

Statement of the Case

Amici incorporate the Statement of the Case set out in Brief for Petitioners.

Summary of Argument

The historical origin of the death penalty for rape lies in the long standing view of rape as a crime of property where the aggrieved was not the woman but her husband or father. In the Southern states this view coalesced with a tradition which valued white women according to their purity and chastity and assigned them exclusively to white men.

As a result, a double standard of justice developed for weighing and punishing rape by white and black men. This double standard of justice was reflected in Georgia's penalty structure for rape which, until the abolition of slavery, reserved the death penalty exclusively for black men. Even since 1861, the death sentence has rarely been imposed on white men.

The history of rape as a crime against man's property, not against the woman herself, sheds light on the ambivalent treatment of the victim who is viewed not simply as the virgin whose violation inspires outrage but also as the temptress who threatens every man with conviction. This latter perception, as well as the severe penalties attached to a rape conviction, has led to special rules requiring corroboration of the victim's testimony, permitting evidence of the woman's prior sexual conduct or reputation for chastity and authorizing

cautionary jury instructions which impugn the victim's credibility.

The death penalty for rape does not meet "contemporary standards regarding the infliction of punishment," Woodson v. North Carolina, 96 S. Ct. 2978 (1976), and hence runs afoul of the Eighth Amendment. Jury repudiation of the penalty is apparent. Moreover, overly severe penalties for rape, epitomized by the death penalty, are counterproductive to the goal of affording maximum legal protection to victims of rape since they have led to a conviction rate for rape which is lower than that for any other major violent crime.

Amici, interested in effective enforcement of laws against rape, urge that the death penalty for rape be invalidated because it stems from archaic notions which demean women and gross racial injustice and does not serve the goal of convicting and subjecting to criminal sanctions those who are in fact guilty of rape.

ARGUMENT

Introduction

The women's movement has recently focused increased attention on the crime of rape, because of a concern that the legal system does not adequately protect women victims of rape. Courts and commentators have noted the unique treatment of rape within the criminal law: a confluence of several factors -- special evidentiary requirements, an extreme penalty structure, and prejudiced attitides of police, prosecutors, juries and judges toward women complainants -- has led to a lower conviction rate for rape than for any other violent crime. See People v. Rincon-Pineda, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975); Brownmiller, Against Our Will: Men, Women, and Rape (1975); Law Enforcement Assistance Administration, Rape and Its Victims: A Report for Citizens, Health Facilities and Criminal Justice Agencies (1974); Medea and Thompson, Against Rape (1974); Note, "The Victim in a Forcible Rape Case: A Feminist View," 11 Am. Crim. L. Rev. 335 (1973); Note, "Rape and Rape Laws: Sexism in Society and Law," 61 Calif. L. Rev. 919 (1973); Note, "The Rape Victim: A Victim of Society and the Law," 11 Willamette L.J. 36 (1974). The death penalty as a potential sanction for rape is part of the fabric of laws and enforcement patterns based on obsolete and demeaning notions about women which

inevitably yields lack of enforcement of rape laws, rather than protection of women.

Amici submit the instant brief on behalf of a large segment of the women's legal community who oppose the death penalty for rape as a vestige of an ancient, patriarchal view of women as the property of men, as a reflection of societal ambivalence toward the woman victim, and as a barrier to proper and vigorous enforcement of rape laws. Review of the history and impact of the death penalty for rape demonstrates that it is premised on chivalric concepts of property and protection, which as this Court has noted, "put women not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). Moreover, in this country, the death penalty for rape has operated in a singularly uneven fashion: it has been applied overwhelmingly to condemn black men for "violating" Southern white women. Wolfgang and Reidel, "Race, Judicial Discretion, and the Death Penalty", Annals, Amer. Acad. of Polit. & Soc. Sc., Vol. 407, 119, 126-33 (1973).

In arguing that the death penalty for rape is intolerable in our society, amici continue the efforts of an earlier generation of women who firmly rejected the notion that destruction of men's lives served to protect and honor women. In the nineteen-thirties, more than

forty thousand women signed a petition declaring that ...

> ... lynching is an indefensible crime. We believe that ... public opinion has accepted too easily the claim of lynchers and mobsters that they were acting solely in the defense of womanhood. In the light of facts, women can no longer permit the claim to pass unchallenged nor allow themselves to be the cloak behind which those bent upon personal revenge and savagery commit acts of violence and lawlessness in the name of women. We repudiate this disgraceful claim for all time.

Association of Southern Women for the Prevention of Lynching, A New Public Opinion on Lynching, Bulletin No. 5 (1935).

On reasoned analysis, the death penalty for rape cannot withstand measurement against the Eighth Amendment's proscription of punishments which contravene "contemporary standards regarding the infliction of punishment", Woodson v. North Carolina, 96 S. Ct. 2978, 2983 (1976). Its rejection will eliminate a deplorable remnant of the historical stigmatization of women as a subordinate class, and will increase the chance that the law will genuinely serve the interests of the victims of this crime.

I.

The death penalty for rape should be rejected as a vestige of an ancient, patriarchal system in which women were viewed both as the property of men and as entitled to a crippling "chivalric protection." It is part of the fabric of laws and enforcement practices surrounding rape which in fact hamper prosecution and convictions for that crime, thus leaving women with little real protection against rape.

A.

Historical Origins of the Death Penalty For Rape.

Historically rape was seen as a crime of property. The person aggrieved by rape was not the woman herself, but rather her father or husband because his property had been violated. For example, under Mosaic law the rapist of a virgin was penalized by forcing him to pay the bride price to the father and to marry the woman. Deuteronomy 22:13-29. Presumably, this reflected the social reality that the father could not collect a bride price for his "sullied property" elsewhere, and was thus given the money he had lost; the rapist in turn collected the woman as "bride" because he had in

fact paid the requisite sum. Similarly, under ancient Babylonian law, criminal rape was "the theft of virginity, an embezzlement of (the woman's) fair price on the market," Brownmiller, supra, at 9.

These ancient concepts continued into Western law. At common law, the woman victim could save her attacker from the death sentence or blinding and castration by accepting him as her husband*; marriage might be said to be repayment for the destruction of her marriage value by rape, that is, the ruination of property. Note,"Rape and Battery Between Husband and Wife," 6 Stan. L. Rev. 719, 724 & n. 26

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* Chitty reports that:

> According to [Lord Coke,] ... [rape] was anciently punished with death .... The penalty was mitigated, or rather altered into a deprivation of sight as well as of the offending members by William the Conqueror.... It seems, however, that the female on whom the injury was committed had it in her power to save her ravisher from this terrible sentence by accepting him as her husband.

3 Chitty, Practical Treatise on the Criminal Law 813 (1819). Accord, 1 Hale, Pleas of the Crown 627 (1778).

(1954).* A raped woman could not sue her rapist because "no one except those entitled to the services of the female could maintain an action." 35 Cyc. 1295 (1910). And in the eyes of the law, a married woman could not be raped by her husband since she was already his property, 1 Hale, Pleas of the Crown 629 (1778), just as in American law a slave woman could not be raped by her master. Brownmiller, supra, at 176. J.H. Franklin, From Slavery to Freedom 188 (1969); S. Elkins, Slavery 59 (1973). Even in the mid-1950's, the law immunized a husband from rape charges by his wife in fourteen American jurisdictions. Note, supra, 6 Stan. L. Rev. at 722 n.11.**

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* This concept of the penalty was translated into American law. In Massachusetts, for example, the penalty for rape of a virgin was the payment of damages and an injunction to marry the victim. Haskins, Law and Authority in Early Massachusetts 142-152 (1960).

** For example, in New York, for the purpose of the criminal law defining sex offenses, a female is defined as "any female person who is not married to the actor." N.Y. Penal Code §130.00 (McKinney's 1975).

In the South, this property tradition was particularly pernicious. White women were recognized as the possessions of white men, I. Baxter, Marital Property §1.1, (1973). L. Bullard, The Slave-Women of America 1870, as cited in P. Rooke Women's Rights, 97 (1972), but were valued more highly than slaves - persons owned explicitly under the law as chattel. S. Elkins, Slavery, 50 (1973); P. Foner, History of Black Americans, 257 (1975). The value of a slave lay in his/her capacity to toil and to reproduce, Elkins, supra, at 55, but the worth of a white woman was determined by her chastity, purity and exclusivity. W.H. Collins, The Truth about Lynching and the Negro in the South, 56-57 (1918); S. Feldman, The Rights of Women 29 (1974). In this view, rape was particularly injurious to a white woman because it undermined her worth, and thus hindered her ability to marry or lowered her value as the exclusive sexual property of her husband. One commentator has forthrightly discussed just these property values:

> ...the woman's power to withhold or grant sexual access is an important bargaining weapon....
>
> The consent standard in our society does more than protect a significant item of social currency for women; it fosters, and is in turn bolstered by, a masculine pride in the

> exclusive possession of a sexual object....An additional reason for the man's condemnation of rape may be found in the threat to his status from a decrease in the "value" of his sexual "possession" which would result from forcible violation.

Comment, "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," 62 Yale L.J. 55, 70, 72, 73 (1952).

The legal response to rape in the South dramatically emphasized the value of chastity for white women.* Rape of a virgin, "the citadel of whose character is virtue," meant that "all is gone: her love of justice, sense of character and regard for truth." Camp v. State, 3 Ga. 417, 422 (1847). The raped virgin white woman "was incapable of deeper degradation." Id. Courts stressed "the true value of woman's virtue."

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* In sharp contrast, the law did not even recognize the rape of black women slaves by their masters, since they were already their property. Rape by other white men was only a trespass. Brownmiller, supra at 176. See also, 1 Stewarts Ala. Report 320 (1828); J.H. Franklin, From Slavery to Freedom 188 (1969); S. Elkins, Slavery 59 (1973).

Sims v. Balkcom, 220 Ga. 7, 11, 136 S.E. 2d 766, 769 (1964), because of her role as "the mother of the human race, the bedrock of civilization." Id. at 10. As recently as 1964, the Georgia Supreme Court upheld the death penalty for rape on the basis of "protect[ion] [of] the mothers of mankind" from "the forcible sexual invasion of her body, the temple of her soul, thereby soiling for life her purity, the most precious attribute of all mankind." Id. at 11.

White men alone had sexual access to white women. Rape of white women by black men threatened the white man's status by decreasing the value of his sexual possession, see Comment, supra, 62 Yale L.J. at 73; Brownmiller, supra at 241, and by jeopardizing the "purity" of his race, and it was therefore necessary to take extreme measures to prevent this result. Lynching was one such measure; a double standard of justice for weighing rape by white men and by black men was another; and the death penalty for rape - particularly when perpetrated by blacks - was yet a third.

The Georgia courts early defined a double standard of justice for rape law. In 1851, the Georgia Supreme Court found that rape perpetrated by a black slave on a free white female "...is calculated to excite indignation in every heart...." Stephen, A Slave v. State, 11 Ga. 225, 230 (1851). Thus, that court, mindful of "racial differences and the well-

established customs which emphasize these differences," allowed a jury to infer intent to commit rape when the evidence showed only an assault committed by a negro man upon a white woman. McCullough v. State, 10 G.A. 403, 73 S.E. 546, 547 (1912). In Dorsey v. State, 108 Ga. 477, 480 34 S.E. 135, 136, 137 (1899), the Georgia Supreme Court explained that race might properly be considered "to rebut any presumption that might otherwise arise in favor of the accused that his intention was to obtain the consent of the female upon failure of which he would abandon his purpose to have sexual intercourse with her." But no Dorsey charge was necessary where both persons were "of color and there was no evidence as to their social standing." Washington v. State, 138 Ga. 370, 75 S.E. 253 (1912).

This separate standard for rape committed by black men was reflected in Georgia's penalty structure. In 1816, the Georgia penal code expressly provided that rape committed by a white man would be punished by a term of imprisonment of not more than twenty years, and attempted rape by not more than five years, but that slaves and "free persons of color" were to be put to death for the crimes of rape or attempted rape on a free white female. Ga. Penal Code of 1816, §§33-34; Ga. Acts of 1816 No. 508 §1, Lamar, Compilation of the Laws of Georgia, 571,804(1821). A facially color blind statute was enacted a year after the abolition of slavery.

However, the original purpose of the Georgia legislature in making rape a capital offense remained significant. The objective was perpetration of a dual standard of justice, one in which only black men convicted of raping white women were sentenced to death.

In practice, that objective persisted long after official statements of it were removed from the law books. A study of the death sentences for rape imposed over a 20-year period in 11 Southern States shows that "among 1,265 cases in which the race of the defendant and the sentence are known, nearly seven times as many blacks were sentenced to death as were whites" and that "black defendants whose victims were white were sentenced to death approximately eighteen times more frequently than defendants in any other racial combination of defendant and victim."* Wolfgang and Riedel, "Race, Judicial Discretion and the Death Penalty", Annals, Amer. Acad. of Polit. & Soc. Sc., Vol. 407, 119, 129-130 (1973).

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* Overall, of the 455 men executed for rape since 1930, 89.5% have been non-white, almost double the percentage (48.9%) of blacks executed for murder during the same period. United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 46, Capital Punishment, 1930-1970 12 (August, 1971).

In sum, the death penalty for rape is an outgrowth of both male patriarchal views of women no longer seriously maintained by society, and gross racial injustice created in part out of that patriarchal foundation.

b.

The Effect of the Law's Ambivalence Toward the Rape Victim.

The historical conception of rape as primarily the destruction or devaluation of man's property sheds light on the ambivalent treatment of the victim. She is viewed not simply as the virgin, little Eva, whose violation inspires outrage, Camp v. State, supra, 3 Ga. at 422, but also as the temptress, Eve, by whom "every man is in danger of being prosecuted and convicted." Davis v. State, 48 S.E. 180, 181-2 (Ga.,1904).

These dual and contradictory perceptions have produced a schizophrenic law of rape, characterized on the one hand by unenforceably severe penalties, see Point II, infra, and on the other, by special rules requiring corroboration of the victim's testimony, permitting evidence of the woman's prior sexual conduct or reputation for chastity, and authorizing cautionary jury instructions which impugn the victim's credibility.

These special protections, like the extreme penalties for rape, see Point II, infra, increase the chances that juries will not convict men who are in fact guilty of committing rape. The goal of equitable enforcement of laws against rape would be served far more rationally and realistically by a law neither imposing extreme penalties on, nor granting special protections to, the defendant.

II.

The Death Sentence For Rape Is Impermissible Under The Eighth Amendment Because It Does Not Meet "Contemporary Standards Regarding The Infliction Of Punishment" And Is Inadvisable Since It Diminishes Legal Protection Afforded Rape Victims.

In last Term's death-penalty decision (Woodson v. North Carolina, 96 S.Ct. 2978, 2983-84[1976] the Court delineated the standards for determining whether "the unique and irreversible penalty of death" violates the Eighth Amendment:

> The Eighth Amendment stands to assure that the State's power to punish is "exercised within the

> limits of civilized standards"... Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in Gregg v. Georgia, ante, indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations. (footnotes and citations omitted.)

It is the position of amici that inflicting the death penalty for rape without homicide does not meet the standards set forth by the Court in Woodson. Moreover, women's interest in securing the greatest degree of protection from rape that the legal system can offer consistent with due process would be ill-served by upholding a rape death-penalty statute.

Only three states, Georgia, North Carolina, and Louisiana, currently authorize the death penalty for the rape of an adult female.* However, virtually every state assigns severe penalties to

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* Ga. Code Ann. §27-2534.1 (1975 supp.); N.C. Gen. Stat. §14-21 (1975 cum. supp.); La. Rev. Stat. §14-42 (1974).

a conviction for rape.* Indeed, in many states the penalty structure for rape is more severe than for any other serious but non-homicidal crime. For example, in California, conviction for assault with a deadly weapon or with force likely to produce great bodily injury carries a minimum sentence of one year and a maximum of ten years, yet rape under the same circumstances carries a minimum sentence of three years and a maximum of fifty years. Cal. Penal Code §245, 264 (West 1970).

In the face of the severe penalty structures, the conviction rate for forcible rape is lower than that for any other major crime listed in the F.B.I. Uniform Crime Reports. Of the F.B.I.'s four "violent crime" offenses, murder, forcible rape, robbery and aggravated assault, forcible rape has the highest rate of acquittal or dismissal. F.B.I.

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* I.e., in only three states is the maximum penalty for rape less than twenty years. Ill. (S.H.A. ch. 38 §11-1 [1972])(not less than 4 years); Missouri (V.A.M.S. §559.260)(not less than 2 years); New Hampshire (N.H.R. S.A. 632-A:2 [1975])(15 years). Several states provide a substantial minimum, e.g. Virginia (not less than 5 years) (Code of Va. §18.1-43); and Washington (not less than 5 years)(Wash. Stat. §9.79010).

Uniform Crime Reports 1973 (1974) table 18, at 116. See also People v. Rincon-Pineda, supra, 123 Cal. Rptr. at 129-30.*

Jury rejection of the death penalty for rape is an inescapable fact. As Petitioner's brief points out, only a handful of persons in the United States are under sentence of death for the crime of rape.

Both legal and social science commentators suggest there is a direct link between the harsh penalties which theoretically can be imposed for rape and the dearth of convictions.**

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*Kalven and Zeisel's study of criminal juries found that the juries convicted defendants of rape in just three of a series of forty-two cases studied, while the judge who presided over the same cases would have convicted in twenty-two. H. Kalven & H. Zeisel, The American Jury 252-54 (1966).

**Social science research supports the view that in general the severity of consequences associated with available decision alternatives may be a potent factor in jury decisions. Vidmar, "Effects of Decision Alternatives on the Verdicts and Social

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A recent empirical study which utilized scaling techniques to measure the intensity dimension of popular attitudes toward various crimes found that "rape without serious harm to the victim, manslaughter, and forcible rape were all rated as roughly equivalent" and tentatively concluded that punishments for rape are not in line with public perceptions of its seriousness. Hamilton & Rotkin, "Interpreting the

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(footnote continued from preceding page) **Perceptions of Simulated Jurors", Journal of Personality and Social Psychology, Vol. 22, No. 2, 211 (1972); The American Jury, supra, at 306-308. Thus, one investigator found that when simulated jurors were required to choose between finding a defendant guilty of murder (which they were told would result in a 25 year to life sentence) or not guilty, over 50% voted to acquit. On the same facts, when told that conviction would mean a one to five year sentence, over 90% found the defendant guilty. Vidmar, supra, at 214-21.

Kalven and Zeisel concluded as a result of their study that even with modest sentences, "the jury at times finds the penalty so disproportionate to its view of the offense that it is moved to acquit the defendant rather than subject him to that penalty." The American Jury, supra, at 312.

Eighth Amendment: Perceived Seriousness of Crime and Severity of Punishment", in Bedeau & Pierce, Capital Punishment in the United States, 515, 519 (1976).

Not only do juries in rape cases initially sympathize with the defendant, MacDonald, Psychiatry and the Criminal 235 (1969), but in the cases reported by Kalven and Zeisel in their exhaustive empirical study of criminal juries, juries went so far in their efforts to acquit the defendant as to create an extra-legal defense, the defense of "contributory behavior" on the part of the complainant, and to acquit a rapist or convict him of a lesser offense, notwithstanding clear evidence of guilt. The American Jury, supra, at 254. This documentation of biased jury attitudes in rape cases suggests that juries are even more likely to acquit where extreme penalties for rape also exist.

Judicial analysis of negative jury reaction to severe sentences has focused upon mandatory death penalty statutes. In McGautha v. California, 402 U.S. 183 (1971), this Court noted the "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers", id. at 198, and the fact that "jurors on occasion took the law into their own hands in (murder) cases which were 'wilful, deliberate and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate

for the death penalty. In such cases they simply refused to convict of the capital offense", id.at 199. In Woodson v. North Carolina, supra, 96 S.Ct. at 2984-85, the Court relied in part upon the history of unfavorable juror reaction to the harshness of mandatory death sentences in striking down the North Carolina mandatory death penalty statute. See also Mackey, "The Inutility of Mandatory Capital Punishment: An Historical Note", 54 B.U.L. Rev. 32 (1974). However, even under a non-mandatory statute such as Georgia's, if jurors perceive the crime as less grave than the written law does, they may choose to convict the defendant of a lesser included offense or acquit him entirely rather than find him guilty of a crime punishable by death.*

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*Although the Georgia statutes do not require the Court to inform the jury at the first, guilt-determination stage of the trial, that death is a possible penalty, Ga. Code Ann. §§ 26-3102, 27-2503(b), the extensive voir dire concerning capital punishment scruples which occurs in a death case will virtually always apprise the jurors of that fact. See Coker v. State, 234 Ga. 555, 216 S.E. 2d 782, 792-93 (1975). Moreover, even when the jury is told that the penalty is not their concern
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Moreover, the District Attorney's essentially unfettered discretion as to "whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the trial," would also tend to

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*"the threatened penalty may come to dominate the deliberation, because the jury guesses at the magnitude of the legal penalty, or because it has special reasons to know what the penalty actually is." The American Jury, supra, at 307.

Although the jury itself determines at the second, penalty phase whether to impose the death penalty, the Georgia statute does not require that it be told of its discretion during the first phase. Thus, a juror who believes the death penalty too severe, and fears its application by the court, may vote against finding guilt. Further, research indicates that even where the jury sets the penalty, the likelihood of jury nullification in a case where the penalty is perceived as excessive remains. The American Jury, supra, 311, n. 8.

Note, "Rape and Rape Laws: Sexism in Society and Law," 61 Calif. L. Rev. 919 (1973); Note, "The Rape Corroboration Requirement: Repeal Not Reform," 81 Yale L.J. 1365 (1972).

As expressed by one commentator:

> Societal ambivalence toward rape and its victims is expressed in the high maximum penalty for rape accompanied by a panoply of special instructions and evidentiary rules which decrease the possibility that there will be convictions and that the penalty will ever be imposed.

Babcock, Freedman, Norton and Ross, Sex Discrimination and the Law: Causes and Remedies (1975) at 868. The serious impact which special rules for rape have upon conviction rates is evidenced by New York's experience under a strict corroboration statute: in 1969, for example, there were 1085 arrests for rape in New York City and a mere 18 convictions. N.Y. Times, May 14, 1972, IV, p. 5:5.

Georgia's law reflects this distrust of the woman victim and the concomitant desire to provide the accused male with special protections not available to defendants charged with other crimes.*

*It has been observed that the special

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Ga. Code Ann. 26-2001 (1972); Teague v. State, 208 Ga. 459, 67 S.E. 2d 467 (1951).

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*evidentiary rules governing rape stem not only from distrust of women but also from the severe penalties to which the convicted rapist is subject:

> When the stakes are excessively high, the system becomes distorted in its protection of the accused, and concomitantly harsh in its efforts to be certain that the victim is telling the truth.

Babcock et al., Sex Discrimination, supra, at 868.

This effect was explicitly recognized by the American Bar Association in 1938 when it passed a resolution supporting mental examinations for a prosecuting witness in a rape case in virtually all circumstances. The report stated:

> The penalties for sex-crimes are very severe -- justly so, in most cases. But the very severity of the penalty calls for special procedural precautions to protect an innocent accused from condemnation by unreliable testimony.

Quoted in Commentary to Model Penal Code § 207 (1962) Part II-A, n. 6.

reduce the frequency of prosecutions and convictions for rape in a jurisdiction which has a death penalty statute. Note, "Prosecutorial Discretion", 21 De Paul L. Rev., 485, 486 (1972). See also Alschuler, "The Prosecutor's Role in Plea Bargaining", 36 U. Chi. L.R. 50, 55 (1966). This effect is apparently not confined to the United States. One report concluded that an effect of Norway's high minimum penalties for sex offenses was that the prosecutor "sometimes waived the prosecution in cases which perhaps ought to have been brought before the court, feeling that the punishment which the court would be bound to inflict would be too severe." Andenaes, Norwegian Legislation and Practice Concerning Sexual Offenses, in SEXUAL OFFENSES, Report of the Cambridge Dept. of Crim. Sci. 466 (Radzinowicz ed. 1957).

Finally, analysts have noted that the special evidentiary rules applied in rape cases, which stem at least in part from the heavy penalties associated with a rape conviction, both increase the likelihood of acquittal and deter the victim from prosecuting. See pp. 19-22 supra.*

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* For those concerned about protecting the victims of rape, there is one further argument against the death penalty: where rape as well as

In sum, because the death penalty for rape does not accord with "contemporary standards regarding the infliction of punishment", Woodson v. North Carolina, supra, 95 S. Ct. at 2983, as measured especially by jury determinations, it does not pass muster under the Eighth Amendment. In addition, genuine concern for victims of rape leads to the conclusion that severe statutory penalties, epitomized by the death penalty, are unacceptable since they do not serve the goal of convicting and subjecting to criminal sanctions those who are in fact guilty of rape.

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* murder is made a capital crime, "the criminal has every reason to kill his victim, since in this way he removes at a stroke the best possible witness against him without appreciably increasing the severity of his punishment if he is caught." Bedeau, The Death Penalty in America 273 (1967).

CONCLUSION

For the reasons stated above, Petitioner's death sentence for rape is unconstitutional and the decision of the court below should be reversed.

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